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No. 05-1448

In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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March 2, 2007

QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit pension plan and that has elected to terminate the plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, to consider a union's proposal to merge the plan with a multiemployer plan.

LIST OF PARTIES AND CORPORATIONS

The parties to this proceeding are the same as those in the proceeding in the U.S. Court of Appeals for the Ninth Circuit: Petitioner Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Paper Company and Crown Vantage, Inc., and Respondents PACE International Union, Edward J. Miller, and Jeffrey D. Macek.

Corporate Disclosure Statement: Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed on May 10, 2006.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES AND CORPORATIONS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 9

ARGUMENT 13

CROWN DID NOT HAVE A FIDUCIARY OBLIGATION TO CONSIDER PACE'S MERGER PROPOSAL 13

A. A Decision Concerning Merger of a Pension Plan Is a Plan Sponsor Function Not Subject to ERISA Fiduciary Duties 13

B. ERISA's Text and Structure Establish that Merger Is an Alternative to—Not a Means of—Standard Termination of a Pension Plan. 20

1. Plan Merger Cannot Serve as a Means of Standard Termination Because Merger Does Not Satisfy 29 U.S.C. § 1341's Textual Requirements. 21

2. ERISA's Structure Confirms That Merger Is Not a Means of Termination. 28

CONCLUSION 36

APPENDIX

29 U.S.C. § 1058 ..... 1a
29 U.S.C. § 1341 ..... 2a
29 U.S.C. § 1344 ..... 24a
29 U.S.C. § 1412 ..... 36a
29 C.F.R. § 4041.28 ..... 41a

TABLE OF AUTHORITIES

CASES

Beck v. PACE Int'l Union, 427 F.3d 668 (9th Cir. 2005) ..... *passim*

Beck v. PACE Int'l Union, 146 Fed. Appx. 917 (9th Cir. 2005) ..... *passim*

Beck v. PACE Int'l Union, 2003 U.S. Dist. LEXIS 2283 (N.D. Cal. 1988) ..... *passim*

Bigger v. Am. Commercial Lines, Inc., 862 F.2d 1341 (8th Cir. 1988) 33

Brillinger v. Gen. Elec. Co., 130 F.3d 61 (2d Cir. 1997) 32, 34

Carter v. United States, 530 U.S. 255 (2000) 29

CFTC v. Weintraub, 471 U.S. 343 (1985) 4

Chait v. Bernstein, 835 F.2d 1017 (3d Cir. 1988) 34

Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006) 34

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 30

Gutierrez v. Ada, 528 U.S. 250 (2000) 22

Hawkeye Nat'l Life Ins. Co. v. Avis 122 F.3d 490 (8th Cir. 1997) 33

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) ..... *passim*

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961).....22

Jones v. United States, 527 U.S. 373 (1999).....22

Lockheed Corp. v. Spink, 517 U.S. 882 (1996).....14, 15, 16, 19

Malia v. Gen. Elec. Co., 23 F.3d 828 (3d Cir. 1994) 17, 35

Musto v. Am. Gen. Corp., 861 F.2d 897 (6th Cir. 1988).....18

PBGC v. LTV Corp., 496 U.S. 633 (1990).....24

Pegram v. Herdrich, 530 U.S. 211 (2000).....13, 14, 19

Pilkington PLC v. Perelman, 72 F.3d 1396 (9th Cir. 1995).....9

Smith v. United States, 508 U.S. 223 (1993).....31, 32

Sutter v. BASF Corp., 964 F.2d 556 (6th Cir. 1992).....17

United Savings Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) 31

Varity Corp. v. Howe, 516 U.S. 489 (1996).....13

Waller v. Blue Cross of Cal., 32 F.3d 1337 (9th Cir. 1994).....6, 16

STATUTES

28 U.S.C. § 1254(1) 2

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 5

29 U.S.C. § 1002(9) 15

29 U.S.C. § 1002(16)(A)(ii) 13

29 U.S.C. § 1002(21)(A) ..... *passim*

29 U.S.C. § 1021 30

29 U.S.C. § 1031 30

29 U.S.C. § 1058 ..... 2, 12, 32

29 U.S.C. § 1102(b)(3) 30

29 U.S.C. § 1103(c) 34

29 U.S.C. § 1108(c)(3) 13

29 U.S.C. § 1301(a)(3) 4

29 U.S.C. § 1301(a)(16) 21

29 U.S.C. § 1307(a) 24

29 U.S.C. § 1307(e)(1)(B) 25

29 U.S.C. § 1341 ..... *passim*

29 U.S.C. § 1341(a)(2) 33

29 U.S.C. § 1341(b) 3, 11

29 U.S.C. § 1341(b)(3) 27

29 U.S.C. § 1341(b)(3)(A) ..... *passim*

29 U.S.C. § 1341(b)(3)(A)(i) 11, 26, 27, 28

29 U.S.C. § 1341(b)(3)(A)(ii) ..... *passim*

29 U.S.C. § 1341(b)(3)(B) 23

29 U.S.C. § 1344 ..... *passim*
29 U.S.C. § 1344(a) 23
29 U.S.C. § 1344(d)(1) 33
29 U.S.C. § 1344(d)(3)(A) 34
29 U.S.C. § 1350 ..... 21, 25
29 U.S.C. § 1412 ..... *passim*
29 U.S.C. § 1412(a) 24
29 U.S.C. § 1412(b) 25
29 U.S.C. § 1441 26

REGULATIONS

26 C.F.R. § 1.414(*l*)-1(b)(2) 24
26 C.F.R. § 1.414(*l*)-1(b)(5)(iii) 17
29 C.F.R. § 2525.104-4 33
29 C.F.R. § 4041.23 33
29 C.F.R. § 4041.28 2
29 C.F.R. § 4041.28(c)(1) 23
29 C.F.R. § 4041.28(c)(2) 21, 24

MISCELLANEOUS

Fed. R. Bankr. P. 7065 7
Fed. R. Civ. P. 65(a)(2) 7

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Ninth Circuit's opinions are available at 427 F.3d 668 (reported opinion) and 146 Fed. Appx. 917 (unreported opinion), and are reprinted at Pet. App. 1–24 and Pet. App. 25–28 respectively. The Ninth Circuit affirmed in part and vacated in part the unpublished opinion of the U.S. District Court for the Northern District of California, reprinted at Pet.

App. 29–50. The district court affirmed the preliminary injunction order entered by the U.S. Bankruptcy Court for the Northern District of California on February 5, 2002 (Pet. App. 74–76), which incorporated by reference oral findings of fact and law made on December 11, 2001 (Pet. App. 51–73). By stipulation of the parties approved by the bankruptcy court, the preliminary injunction order was deemed a final judgment on the merits. Pet. App. 78, 83.

JURISDICTIONAL STATEMENT

The Ninth Circuit entered its judgment and opinions on October 24, 2005, and denied Petitioner's timely petition for rehearing and suggestion of rehearing en banc on January 10, 2006. Petitioner's application to extend the time to file a petition for writ of certiorari through May 10, 2006, was granted by Justice Kennedy on February 21, 2006. Supreme Court Docket No. 05A769. The petition for a writ of certiorari was filed on May 10, 2006, and was granted on January 19, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The complete text of 29 U.S.C. §§ 1058, 1341, 1344, and 1412, and 29 C.F.R. § 4041.28, is set forth in the Appendix following this brief.

STATEMENT OF THE CASE

1. Petitioner Jeffrey H. Beck serves as Trustee of the Crown Paper Liquidating Trust, the bank-

ruptcy successor-in-interest to Crown Vantage, Inc., and Crown Paper Company (collectively, "Crown"). Crown operated a series of paper mills through which it employed approximately 2,600 workers, many represented by Respondent PACE International Union through collective bargaining agreements. Pet. App. 4, 55.

In 2000, Crown filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Northern District of California. Pet. App. 55. During the liquidation process, the Pension Benefit Guaranty Corporation ("PBGC") filed proofs of claim totaling millions of dollars representing the liability it would have to assume in order to take over Crown's various pension plans. Pet. App. 4, 56. Crown served as both sponsor and administrator for the plans. J.A. 17–18; Pet. App. 56.

In order to address the "stumbling block to plan confirmation" posed by the PBGC proofs of claim, in July 2001 Crown began investigating the possibility of effecting a "standard termination" of the pension plans through the purchase of an annuity, pursuant to 29 U.S.C. § 1341(b). Pet. App. 4, 56. Shortly thereafter, PACE proposed that Crown instead merge seventeen of Crown's hourly employee plans into the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan PACE founded.[1] In August 2001, representatives for

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[1] A multiemployer plan is a collectively-bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. *See* 29

Crown and PACE met to discuss the possibility of merger. Pet. App. 57–58. Crown subsequently requested and received additional information regarding PACE's merger proposal. Pet. App. 58–59.

In late September 2001, Crown's Board of Directors met and reviewed preliminary annuitization bids. Pet. App. 59. Crown learned that annuitization of certain of the pension plans was possible and that the process might also create a "reversion" of residual plan assets to the company for its creditors' benefit.[2] Pet. App. 59. The PBGC agreed to release its claims against the Crown bankruptcy estate if Crown annuitized its pension plans. Pet. App. 62.

On October 9, 2001, Crown received final annuitization bids, which were set to expire in twenty-four hours. Pet. App. 60–61. Crown decided to merge eleven of the hourly-employee pension plans into a twelfth, Crown Plan No. 7.[3] Pet. App. 43–44. Crown then terminated the merged Crown Plan No. 7

U.S.C. § 1301(a)(3). These plans are often referred to as "Taft-Hartley plans."

[2] As a Debtor in bankruptcy, Crown had a fiduciary obligation to its creditors to maximize the assets of the estate. *See CFTC v. Weintraub*, 471 U.S. 343, 355 (1985).

[3] Responsibility for the five underfunded hourly plans included within PACE's merger proposal reverted to the Georgia Pacific Company, the successor of a prior sponsor of the plans, pursuant to a prior agreement between Georgia Pacific, Crown, and the PBGC. Pet. App. 61; Trans. of Proceedings, Nov. 27, 2001 (Bankr. Ct. Dkt. 22), at 92–93, 232–33, 270–71.

through the purchase of an $84 million annuity from the Hartford Life Insurance Company. Pet. App. 60–61. The annuitization of Crown Plan No. 7 through Hartford provided all plan participants with 100% of their accrued plan benefits, Pet. App. 66, and at the same time created a reversion of approximately $5 million in surplus plan assets that could be made available to Crown's creditors. Pet. App. 61. Crown signed a deposit agreement with Hartford on October 10, 2001, and formally purchased the annuity the next day. Pet. App. 61, 78.

2. After Crown terminated Crown Plan No. 7 through purchase of the Hartford annuity, Respondent PACE, on behalf of its members and former member plan participants, as well as Respondents Miller and Macek, on behalf of themselves and similarly situated Crown plan participants, filed an adversary proceeding in the Crown bankruptcy alleging that Crown violated its fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, by failing to adequately consider PACE's merger proposal. J.A. 13. The respondents sought, *inter alia*, injunctive relief (1) rescinding the purchase of the Hartford annuity and (2) preventing Crown from distributing the $5 million reversion to Crown creditors.[4] Pet. App. 7; J.A. 29.

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[4] PACE did not, however, seek the rescission of Crown's transfer of the five underfunded plans to Georgia Pacific. *See* J.A. 27–28.

After an evidentiary hearing held on November 29, 2001, the bankruptcy court issued oral findings of fact and law via telephonic conference on December 11, 2001. The bankruptcy court determined that Crown "gave no serious consideration" to PACE's merger proposal. Pet. App. 62. The bankruptcy court acknowledged that the decision to terminate a plan is a business decision not subject to a fiduciary duty, but noted that "both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision." Pet. App. 65 (citing *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342 (9th Cir. 1994)). The bankruptcy court held that Crown's decision between annuitizing the pension plans and merging them into PIUMPF constituted such a discretionary act.[5] Pet. App. 66. Though Crown's conduct in selecting and purchasing the Hartford annuity "almost surely would have passed muster" in the absence of PACE's merger offer, the bankruptcy court stated that once the merger option was raised, Crown had a fiduciary duty to

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[5] Though the bankruptcy court concluded that PACE's merger proposal served as a potential method of implementing the standard termination of Crown's pension plans, the bankruptcy court's findings of fact implicitly treated merger and standard termination as separate processes. *See* Pet. App. 57 ("[In summer 2001], both Pace and Crown viewed such *merger* as advantageous . . . [as] it wasn't at all clear to Crown that the plans had adequate assets to allow *standard termination*.") (emphasis added); *see also* Pet. App. 32 (district court noting "[t]he bankruptcy court found that [PACE's proposed] *merger* would be superior to *standard termination* in two ways") (emphases added).

explore it fully. Pet. App. 65. The bankruptcy court concluded that Crown violated its fiduciary duties by failing to adequately consider PACE's merger offer. *Ibid.*

The bankruptcy court partially granted PACE's motion for preliminary injunction, but declined to rescind the purchase of the Hartford annuity because of the substantial financial losses that would otherwise result. Pet. App. 66. Instead, the bankruptcy court ordered that the reversion proceeds be held in a separate account, and ordered the parties to report on the feasibility of investing the reversion into the Crown employee benefit plans. Pet. App. 67. The bankruptcy court subsequently issued a written order incorporating by reference its oral findings. Pet. App. 74–76. By stipulation of the parties, made at the court's request and with the court's approval, the preliminary injunction ruling was consolidated with final judgment on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2) and Federal Rule of Bankruptcy Procedure 7065. Pet. App. 78. The parties agreed to a mechanism for the distribution of the reversion for the benefit of the plan participants, the operation of which has been suspended during the ensuing appeals. Pet. App. 79–81.

3. Crown appealed to the district court. On appeal, Crown argued that merger with PIUMPF was not a method of terminating the plans and that, therefore, the choice between merger and termination was a plan sponsor decision not subject to ERISA fiduciary duties. Pet. App. 45. Though Crown also argued that ERISA's separate statutory

treatment of termination and merger precluded the possibility that merger could be a means of implementing standard termination, *compare* 29 U.S.C. § 1341 *with* § 1412, the district court held that the language of § 1341(b)(3)(A)(ii) was broad enough to encompass merger as a termination procedure that could, "in accordance with the provisions of the plan and any applicable regulation, otherwise fully provide all benefit liabilities under the plan." Pet. App. 46. The district court then considered whether the merger with PIUMPF could have been achieved in accordance with the plan's provisions, as required by § 1341, and determined that plan language posed no barrier to PACE's proposal because the plan included separate provisions permitting termination and merger. Pet. App. 47. Accordingly, the district court concluded that "Crown's Directors, failing to consider the merger option seriously while acting as the plan administrator, breached the fiduciary duties under ERISA." Pet. App. 48.

4. Crown appealed the district court's decision on the merits to the Ninth Circuit. PACE cross-appealed, challenging the district court's standing determination.

Crown again argued that its choice to terminate the pension plan rather than to merge it with the PIUMPF was a plan sponsor decision not subject to ERISA fiduciary obligations. Pet. App. 9. The Ninth Circuit concluded that 29 U.S.C. § 1341(b)(3)(A) was ambiguous and, therefore, that it permitted merger as a method of, rather than an alternative to, standard termination of a pension plan. Pet. App. 11–12. In so holding, the court rejected Crown's

arguments that ERISA's statutory treatment of merger and standard termination as separate processes foreclosed the possibility that merger is a valid method of effecting a standard termination under § 1341. Pet. App. 12–15. Having determined that merger was a permissible means of plan termination, the Ninth Circuit held that Crown had a fiduciary obligation to make the decision between the two "with an eye single to the interests of the participants and beneficiaries," Pet. App. 16–17 (quoting *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1402 (9th Cir. 1995)), which Crown violated by failing to give PACE's merger proposal serious consideration. Pet. App. 20.

5. The Ninth Circuit denied Crown's petition for panel rehearing with suggestion of rehearing en banc, even though both the Department of Labor and the PBGC supported the petition as separate *amici curiae*. Pet. App. 84–85.

SUMMARY OF THE ARGUMENT

By holding that Crown had a fiduciary duty to consider PACE's merger proposal because merger constitutes a permissible means of implementing the termination of a single-employer plan, the Ninth Circuit misconstrued ERISA. Crown had no such fiduciary duty for two separate and independent reasons. First, a decision considering whether or not to merge a pension plan is always a non-fiduciary plan sponsor function, no matter when the decision is made. Second, ERISA's text and structure establish that merger is not a means of implementing the standard termination of a pension plan.

1. ERISA distinguishes between plan *sponsor* decisions, which are not subject to fiduciary duties, and plan *administrator* decisions, which are subject to fiduciary duties. Under ERISA, a person is a fiduciary only to the extent that the person fulfills certain statutorily defined functions. As the functions listed in ERISA's definition of fiduciary, 29 U.S.C. § 1002(21)(A), do not include decisions relating to plan design or structure, the decision whether to amend, modify, or terminate a pension plan is not subject to fiduciary duties. A decision concerning merger, like a decision concerning whether to amend or terminate a plan, relates to the plan's composition or design. Therefore, Crown's decision regarding PACE's merger proposal was a plan sponsor function not subject to fiduciary duties.

The Ninth Circuit recognized that a decision to terminate does not involve an ERISA fiduciary function, but held that merger was a *means* of termination, and that therefore Crown's decision regarding merger was a fiduciary function because it involved the "implementation" of the termination decision. In so doing, the Ninth Circuit erred. Under ERISA, the fiduciary status of an act is not based on when the act is performed, but rather is determined by the act's nature. Because a merger decision always involves considerations of plan structure or design, it is always a non-fiduciary plan sponsor decision, regardless of whether it is made before, in conjunction with, or after a decision to terminate.

2. a. The text of the ERISA provision governing plan termination, 29 U.S.C. § 1341, establishes that merger is an alternative to, rather than a method of

implementing, the standard termination of a pension plan. A standard termination under § 1341(b) requires that plan assets be "distributed" to plan participants either through the purchase of annuities from an insurer who in turn commits to providing the plan benefits, § 1341(b)(3)(A)(i), or through means that "otherwise *fully provide* all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(ii) (emphasis added). When read in the context of the remainder of § 1341 and the text of § 1344, "otherwise fully provide" means to *pay* plan benefits in *full satisfaction* of plan liabilities. A merger under 29 U.S.C. § 1412 does not satisfy either of § 1341(b)(3)(A)(ii)'s textual requirements. Instead, merger merely *transfers* plan assets and liabilities to another plan, leaving the plan's benefit liabilities unsatisfied and subject to the ERISA regulatory regime. Therefore, merger cannot be a means of standard termination according to the plain terms of § 1341.

b. Having incorrectly found § 1341(b)(3)(A)(ii) to be ambiguous, the Ninth Circuit resolved that ambiguity by ascribing significance to Congress's inclusion of provisions governing merger and termination within the same ERISA title, Title IV. In so doing, the Ninth Circuit ignored fundamental canons of statutory construction. The inclusion of provisions governing termination and merger within the same ERISA title is insignificant. Rather than looking at the placement of provisions within ERISA, the Ninth Circuit should have looked to the structure of ERISA as a whole and considered whether ERISA contem-

plates that the separate provisions governing merger and termination will apply to the same processes.

ERISA's structure confirms that merger is an alternative to, rather than a method of, plan termination. ERISA goes so far as to define merger and termination *in contrast* to each other: a merger's validity under 29 U.S.C. § 1058 is predicated on whether the post-merger plan, were it immediately terminated, would grant each participant the same benefits as would a termination of the pre-merger plan, which is tautological if merger were a means of standard termination of a pension plan. ERISA also imposes different and contradictory procedural requirements on merger and termination. Furthermore, termination allows the reversion of surplus plan assets to the plan sponsor and plan participants, but merger does not allow either reversion to the plan sponsor or enhancement of the participants' accrued benefits. Therefore, ERISA's overall statutory scheme establishes that it is simply impossible for merger to serve as a means of termination.

Because merger is not a valid means of implementing the standard termination of a pension plan, Crown had no fiduciary obligation to consider PACE's merger proposal. The Ninth Circuit thus erred in imposing fiduciary duties on Crown's sponsor-level, non-fiduciary decision to reject PACE's merger proposal. This Court should reverse the Ninth Circuit's erroneous decision.

ARGUMENT

CROWN DID NOT HAVE A FIDUCIARY OBLIGATION TO CONSIDER PACE'S MERGER PROPOSAL.

The Ninth Circuit's decision should be reversed for two separate and independent reasons. First, a decision concerning merger is always a plan sponsor decision, regardless of when it is made, and ERISA does not subject such plan sponsor decisions to fiduciary duties. Second, because ERISA's text and structure establish that merger is not a means of implementing the standard termination of a single-employer plan, Crown could not have had a fiduciary duty to consider PACE's merger proposal.

A. A Decision Concerning Merger of a Pension Plan Is a Plan Sponsor Function Not Subject to ERISA Fiduciary Duties.

Under ERISA, "an employer is permitted to act both as plan sponsor and plan administrator." *Varity Corp. v. Howe*, 516 U.S. 489, 526 (1996) (Thomas, J., dissenting) (citing 29 U.S.C. § 1108(c)(3)); *see also* 29 U.S.C. § 1002(16)(A)(ii) (providing that a plan sponsor also serves as plan administrator if the plan instrument fails to designate a plan administrator). When acting in its capacity as a plan *sponsor*, an employer may pursue its business interests, even if such interests are contrary to the interests of plan members. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (employer acting in its capacity as plan sponsor can modify plan to reduce benefits). When acting in its capacity as plan *administrator*, howev-

er, an employer is subject to ERISA's fiduciary duties. *Id.* at 223; *see also* 29 U.S.C. § 1002(21)(A).

Although ERISA allows employers such as Crown to wear two hats, one as a non-fiduciary plan sponsor and the other as a fiduciary plan administrator, the statute requires that an employer "with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. "In every case charging a breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, performing a *fiduciary function*) when taking the action subject to the complaint." *Id.* at 226 (emphasis added).

This Court's cases draw a bright line between a plan sponsor's non-fiduciary functions and a plan administrator's fiduciary functions. A plan sponsor's functions pertain to "the composition or design of the plan itself." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). As this Court has explained, "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. When employers undertake these actions, they do not act as fiduciaries, but are analogous to the settlers of a trust." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (citations and quotation marks omitted); *see also Hughes*, 525 U.S. at 444 ("ERISA's fiduciary duty requirement simply is not implicated where [a plan sponsor], acting as the Plan's settlor, makes a

decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated."). The *Hughes* Court reaffirmed *Spink* and held that the act of amending a plan "does not constitute the action of a fiduciary." *Hughes*, 525 U.S. at 444.

This functional analysis of a plan sponsor's nonfiduciary acts "is rooted in the text of ERISA's definition of fiduciary." *Spink*, 517 U.S. at 890. Under ERISA, a "person"[6] is

> a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (emphasis added). "[O]nly when filling certain defined *functions*, including the exercise of discretionary authority or control over plan management or administration, does a person become a fiduciary under [29 U.S.C. § 1002(21)(A)]." *Spink*, 517 U.S. at 890 (emphasis added, quotation marks omitted). "Because the defined functions in

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[6] ERISA defines a "person" as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Ibid.* (quotation marks and brackets omitted).

The Ninth Circuit recognized that Crown's decision to terminate its pension plans, as a decision involving plan structure, was a plan sponsor decision not subject to ERISA fiduciary duties. Pet. App. 9. Relying on *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994), however, the Ninth Circuit concluded that the *implementation* of a decision to terminate is a fiduciary function. From that premise, the Ninth Circuit reasoned that whether Crown had a fiduciary obligation to consider the union's merger proposal turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." Pet. App. 9.

The flaw in the Ninth Circuit's reasoning is its failure to apply ERISA's functional analysis to Crown's merger decision. Under ERISA, whether a particular act is a fiduciary function depends upon the nature of the act itself. In *Waller*, the court applied ERISA's functional analysis to determine that the choice of an annuity provider "is the quintessential exercise of 'discretionary control.'" *Waller*, 32 F.3d at 1342 (quoting 29 U.S.C. § 1002(21)(A)). Applied here, that same functional analysis establishes that the choice of whether or not to merge a pension plan is a sponsor-level business decision to which fiduciary duties do not attach, even if merger were a method of termination under ERISA (which it is not).

As both the Third and Sixth Circuits have recognized, under ERISA's functional analysis a decision regarding merger pertains to plan design or structure and is therefore, necessarily a non-fiduciary plan sponsor decision. *See Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) ("Efforts by an employer to merge two pension plans do not invoke the fiduciary duty provisions of ERISA. Such duties do not attach to business decisions related to modification of the design of a pension plan, and in such circumstances the plan sponsor is free to act as an employer and not a fiduciary.") (quotation marks and citation omitted); *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) ("BASF's decision to merge the two plans . . . clearly constituted the establishment or amendment of a pension plan and is therefore a business decision that should not be overturned by the court in the absence of violation of state or federal law."); *see also* 26 C.F.R. § 1.414(*l*)-1(b)(5)(iii) (acknowledging the "change in the benefit structure of a plan in conjunction with a merger").

Decisions regarding merger, like those regarding plan amendment, modification, or termination, impact fundamental matters of plan design and structure: the size of the plan, relevant pool of participants, and the scope of benefits the plan will provide on a going forward basis. Therefore, under ERISA, such decisions are non-fiduciary plan sponsor functions. *See Sutter*, 964 F.2d at 562 ("'There is a world of difference between administering a welfare plan according to its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.'") (quoting

Musto v. Am. Gen. Corp., 861 F.2d 897, 911 (6th Cir. 1988)).

Rather than evaluating Crown's fiduciary obligations through ERISA's functional analysis, the Ninth Circuit effectively invented a new test that hinges on *when* a merger-related decision is made. Under the Ninth Circuit's analysis, a decision concerning merger made *before* a decision to terminate would be a plan sponsor function without fiduciary obligation as it involves plan structure and does not involve "implementation" of termination.[7] But a decision concerning merger made *after* a decision to terminate is a fiduciary decision, according to the Ninth Circuit, because it concerns the "implementation" of a termination decision.

The Ninth Circuit's temporal test is wrong as a matter of law. Because a decision concerning merger always implicates plan design or structure, such a decision as a matter of law is *always* a non-fiduciary sponsor decision under ERISA—whether made before, in conjunction with, or after a decision to terminate a plan. Nothing in ERISA's definition of fiduciary suggests that the same function can be non-fiduciary at one moment but fiduciary at a later moment. *See* 29 U.S.C. § 1002(21)(A). Rather, ERISA pro-

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[7] To conclude otherwise and instead read the Ninth Circuit's opinion as holding that decisions regarding merger are *always* subject to fiduciary scrutiny would only enlarge the scope of the Ninth Circuit's error. Decisions involving the adoption, modification, amendment, or termination of a plan are necessarily non-fiduciary plan sponsor functions. *See Hughes*, 525 U.S. at 443–44.

vides that whether an employer wears its fiduciary or non-fiduciary hat depends on whether the employer is "performing a fiduciary function," *Pegram*, 530 U.S. at 226, not *when* the function is performed. *See also Spink*, 517 U.S. at 890 (plan sponsors are generally free to adopt, modify, or terminate plans "for any reason *at any time*") (emphasis added). The Ninth Circuit has in essence repeated the same error that this Court reversed in *Hughes*: the imposition of fiduciary duties upon a non-fiduciary act based on a distinction unsupported by ERISA's definition of fiduciary functions. *See Hughes*, 525 U.S. at 444 (reversing Ninth Circuit ruling that fiduciary status hinged on *type* of pension plan based on fact that ERISA "makes no [such] distinction").

The practical effect of the Ninth Circuit's decision would be that an employer such as Crown in its non-fiduciary plan sponsor capacity could freely reject a union's merger proposal *before* making a decision to terminate, but would be required to reconsider as a fiduciary the same merger proposal *after* a decision to terminate, because under the Ninth Circuit's reasoning, plan-related decisions made after the decision to terminate are fiduciary functions regardless of their actual nature. Thus, whenever a plan sponsor opts to terminate, the Ninth Circuit's decision would require the employer (now wearing its hat as plan administrator, "implementing" the termination) to reconsider the same merger decision that it made as plan sponsor before termination. This strange result cannot be, and is not, compelled by ERISA's functional definition of fiduciary obligation.

In conclusion, whether or not to merge one pension plan with another is a decision involving plan structure just as much as a decision to establish, modify, amend, or terminate a pension plan. As such, it is a plan sponsor function that, under this Court's precedents, is simply not subject to fiduciary obligations. The Ninth Circuit therefore erred in imposing a fiduciary duty on Crown's decisions relating to PACE's merger proposal.

B. ERISA's Text and Structure Establish that Merger Is an Alternative to—Not a Means of—Standard Termination of a Pension Plan.

From its premise that the "implementation" of a termination is always a fiduciary function, the Ninth Circuit reasoned that whether Crown breached any fiduciary duty turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." Pet. App. 9. The court then concluded that under ERISA, merger can serve as a means of effecting plan termination. Pet. App. 13–15. In so holding, the Ninth Circuit misconstrued the text of ERISA's standard termination provision, and disregarded ERISA's structure.

The text of the statutory provision governing standard termination, 29 U.S.C. § 1341, precludes the possibility that merger can serve as a means of effecting the standard termination of a pension plan. In addition, the Ninth Circuit's termination-by-merger concept irreconcilably conflicts with ERISA as a whole, which both expressly and implicitly distin-

guishes between merger and termination as separate processes.

1. Plan Merger Cannot Serve as a Means of Standard Termination Because Merger Does Not Satisfy 29 U.S.C. § 1341's Textual Requirements.

Section 1341 provides that in a standard termination, a plan administrator "shall *distribute* the [plan] assets" by either:

> (i) purchas[ing] irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, *otherwise fully provid[ing] all benefit liabilities under the plan.* A transfer of assets to the [PBGC] in accordance with [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1341(b)(3)(A) (emphasis added). Section 1341(b)(3)(A)(ii) is satisfied only through the lump-sum cash payment of benefit liabilities[8] directly to plan participants, *see* 29 C.F.R. § 4041.28(c)(2), or the transfer of assets to the PBGC on behalf of a missing participant. Yet the Ninth

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[8] ERISA defines "benefit liabilities" as "the benefits of employees and their beneficiaries under the plan." 29 U.S.C. § 1301(a)(16).

Circuit concluded that the provision "is ambiguous at best and neither explicitly nor implicitly prohibits merger into a multiemployer plan as a means of termination of a pension plan." Pet. App. 15. Because in the Ninth Circuit's view § 1341(b)(3)(A)(ii) "provides for alternative means of termination, so long as they are consistent with the plan provisions, applicable regulations, and 'otherwise fully provide all benefit liabilities under the plan,'" *ibid.*, the court concluded that merger could serve as one such means.

Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); *see also Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[W]ords and people are known by their companions."). When the terms of § 1341(b)(3)(A)(ii) are properly considered within the context provided by the remainder of § 1341 and the text of § 1344, it becomes apparent that the Ninth Circuit's conclusion is flawed. Merger into a multiemployer plan cannnot fulfill *either* of statutory requirements for standard termination: merger does not actually "distribute" plan assets to the plan beneficiaries, nor does it "fully provide all benefit liabilities."

First, ERISA requires that termination result in the direct or indirect *payment* of plan assets to plan participants. A standard termination under § 1341 requires that "the plan administrator shall *distribute* the assets in accordance with section 1344 of this title." 29 U.S.C. § 1341(b)(3)(A) (emphasis added). Section 1341 further establishes that to "distribute"

plan assets means to *pay* the assets to satisfy plan liabilities. *See* 29 U.S.C. § 1341(b)(3)(B) (requiring the plan administrator to certify to the PBGC "that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to *pay* all benefit liabilities under the plan") (emphasis added). Section 1344 in turn specifies to whom the distribution of plan assets is to be made: the plan administrator must "*allocate* the assets of the plan (available to provide benefits) *among the participants and beneficiaries of the plan* [in a specified order of priority]." 29 U.S.C. § 1344(a) (emphases added). Properly understood in context, § 1341(b)(3)(A)(ii) requires that in a standard termination, plan assets actually be disbursed to plan participants and their beneficiaries.

Second, ERISA provides that a plan administrator, when effecting a standard termination of a pension plan through a method other than annuitization, must distribute the plan assets in a manner that, "in accordance with the provisions of the plan and any applicable regulations, otherwise *fully provide[s]* all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(ii) (emphasis added). When read in the context of the remainder of § 1341 and the text of § 1344, "otherwise fully provide" means to *pay* plan benefits in *full satisfaction* of plan liabilities. The PBGC's regulation requiring the distribution to fully satisfy the plan's liabilities confirms this reading. *See* 29 C.F.R. § 4041.28(c)(1) (requiring plan administrator to "distribute plan assets in *satisfaction of all plan benefits*") (emphasis added). Because such payment fully satisfies the plan's

liabilities, the plan sponsor ceases paying premiums to the PBGC, *see* 29 U.S.C. § 1307(a) ("Premiums shall continue to accrue until a plan's assets are distributed pursuant to a termination procedure . . . ."), and the PBGC's insurance obligations terminate along with the plan. *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990). A standard termination closes the regulatory book, as it fully provides the participants' plan benefits and extinguishes ERISA liability.

Section 1341(b)(3)(A)(ii)'s two requirements—actual *payment* to plan participants and full *satisfaction* of ERISA liabilities—are met when a lump sum payment in the appropriate amount is made to a plan participant. *See* 29 C.F.R. § 4041.28(c)(2) (providing for the calculation of lump sum payment to be made to plan participants in a standard termination in the absence of annuitization). Merger of a single-employer plan with a multiemployer plan, on the other hand, fails to satisfy *either* of these requirements.

In a merger under § 1412, plan assets are *not* distributed to beneficiaries and allocated according to § 1344. Instead, plan assets and liabilities are *transferred* to the multiemployer plan, where they are *not* allocated solely to the benefit of the original plan's participants. *See* 29 U.S.C. § 1412(a) ("A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section."); *see also* 26 C.F.R. § 1.414(*l*)-1(b)(2) ("The terms 'merger' or 'consolidation' means [sic] the *combining* of two plans into a single plan. . . . [A] merger or consol-

idation will not occur if two plans are not combined in a single plan, such as by using one trust which limits the availability of assets of one plan to provide benefits to participants and beneficiaries of only that plan.") (emphasis added). With one exception,[9] the mere transfer of plan assets within the ERISA statutory and regulatory regime cannot satisfy § 1341(b)(3)(A)'s requirement that plan assets be *distributed* to the plan participants.

Nor are participant benefit liabilities fully *satisfied* by a single-employer plan's merger into a multiemployer plan. Instead, the multiemployer plan offers only the *promise* to pay the same accrued benefits that were earned in the single-employer plan. *See* 29 U.S.C. § 1412(b) (participants' accrued benefits after merger of single-employer plan with multiemployer plan must equal accrued benefits before merger). The administrator of the merged plan continues to pay insurance premiums to the PBGC, *see* 29 U.S.C. § 1307(e)(1)(B), and the PBGC continues to insure the unsatisfied benefit liabilities transferred from the former single-employer plan to

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[9] The final sentence of § 1341(b)(3)(A)(ii) provides: "A transfer of assets to the [PBGC] in accordance with [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant." 29 U.S.C. § 1341(b)(3)(A)(ii). Under the *expressio unius* canon of statutory construction, this exception reinforces the general rule that transfers within the ERISA regime cannot satisfy standard termination's disbursement requirement, as the exception would be superfluous if all such transfers constituted disbursements within the meaning of § 1341(b)(3)(A)(ii).

the multiemployer plan. Because the assets of the single-employer plan are commingled in merger with the assets of a multiemployer plan, the ability of beneficiaries under the former single-employer plan to receive their full benefits from the merged multiemployer plan is subject to the vagaries of the continued health of the merged plan.[10] This is surely not consistent with § 1341 and § 1344.

The Ninth Circuit tacitly acknowledged that merger does not satisfy § 1341(b)(3)(A)(ii)'s textual requirements, but excused the noncompliance based on its erroneous view that annuitization pursuant to § 1341(b)(3)(A)(i) does not satisfy the requirement of "distribution" either:

> [T]he purchase of irrevocable commitments from an insurer to provide all benefit liabili-

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[10] For example, were the multiemployer plan to become insolvent and subsequently be terminated, the consequences to the plan participants of the former overfunded single-employer plan could be disastrous. If the multiemployer plan is not adequately funded, the sponsors of the plan would be required to reduce the benefits to which the participants of the single-employer plan formerly were entitled, *see* 29 U.S.C. § 1441, and as the PBGC's website explains, the PBGC's guarantee would not necessarily make up the shortfall. *See* http://www.pbgc.gov/workers-retirees/benefits-information/content/page14090.html. The participants in the formerly fully-funded single-employer pension plan simply would not be assured of receiving their full retirement benefits—a fact that establishes that plan merger does not "fully provide" plan participants with their benefit liabilities within the meaning of § 1341.

> ties under the plan, pursuant to 29 U.S.C. § 1341(b)(3), such as the annuity to be provided by Hartford Life in this case, does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan. Both scenarios would involve a series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination.

Pet. App. 14–15. The Ninth Circuit's logic evidences a fundamental misunderstanding of the distribution requirement.

When an employer terminates a pension plan through the purchase of irrevocable commitments from an insurer pursuant to § 1341(b)(3)(A)(i), the plan's assets are distributed *outside* of the ERISA-regulated pension plan system to purchase annuity contracts that inure to the sole interest of the former plan participants. The payment of lump-sum disbursements to plan participants, the conventional method of terminating a plan under § 1341(b)(3)(A)(ii), similarly distributes the plan assets outside of the ERISA-regulated system. Merger, on the other hand, involves no such distribution. Instead, the plan assets remain *within* the ERISA regime, where they are *not* allocated solely for the original plan participants' benefit. By equating merger and annuitization, the Ninth Circuit disregarded the crux of the distribution requirement—that the plan assets are paid *outside* of the pension plan system.

In addition, to the extent that annuitization would not otherwise constitute a "distribution" for purposes of § 1341(b)(3)(A), Congress has expressly deemed annuitization such a "distribution" in § 1341(b)(3)(A)(i). Congress has not, however, similarly deemed merger a method of "distribution." Thus, merger's conceded failure to satisfy the distribution requirement of § 1341(b)(3)(A)(ii) should have led the Ninth Circuit to reject it as a potential means of implementing standard termination under § 1341(b)(3)(A)(ii).

In short, 29 U.S.C. § 1341(b)(3)(A)(ii) requires that in a standard termination, plan assets be distributed out of the ERISA-governed pension plan system to plan participants in a manner that fully provides the plan's benefit liabilities. Merger does not satisfy these statutory requirements. The Ninth Circuit therefore erred in holding that merger could serve as a means of implementing a standard termination under § 1341(b)(3)(A)(ii).

2. ERISA's Structure Confirms That Merger Is Not a Means of Termination.

After erroneously concluding that the text of 29 U.S.C. § 1341(b)(3)(A)(ii) is ambiguous as to whether merger is a permissible method of implementing a standard termination, the Ninth Circuit resolved its perceived ambiguity by noting that ERISA's separate provisions governing termination, 29 U.S.C. § 1341, and mergers between multiemployer and single-employer plans, 29 U.S.C. § 1412, are both included within ERISA Title IV, entitled "Plan Termination Insurance." Pet. App. 12. According to the

Ninth Circuit, "[i]t would have been logical for Congress to place § 1412 within Title IV of ERISA because, as [PACE] argue[s], one practical effect of a merger or complete transfer is that at least one pension plan will cease to exist." *Id.* at 12–13. As the "statutory language is unclear" as to "whether Congress intended to permit mergers into multiemployer plans as a means of termination under 29 U.S.C. § 1341(b)(3)(A)," *id.* at 13, placement of these two provisions within Title IV "clarifies the statutory text and supports the conclusion that mergers are a permissible means of termination." *Ibid.*

Though a court may look to the title or heading of a statutory provision when the statutory text is ambiguous, the "title of a statute is of use *only* when it sheds light" on the relevant text. *Carter v. United States*, 530 U.S. 255, 267 (2000) (emphasis added, brackets and quotation marks omitted). Here, the ERISA title heading relied on by the Ninth Circuit, "Plan Termination Insurance," sheds *no* light on the issue at hand: whether standard termination may be effected through merger.

Nor is it of any moment that § 1341 (governing termination) and § 1412 (governing merger) are contained within ERISA's expansive Title IV. Title IV contains six subtitles, each of which governs a variety of subjects.[11] Subtitle C, "Terminations,"

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[11] Subtitle A, "Pension Benefit Guaranty Corporation," establishes the PBGC; Subtitle B, "Coverage," governs coverage provided by the PBGC; Subtitle C, "Terminations," governs plan terminations; Subtitle D, "Liability," governs employers' liability under ERISA; Subtitle E,

contains § 1341, whereas Subtitle E, "Special Provisions for Multiemployer Plans," contains § 1412. That Title IV happens to contain the separate provisions governing terminations and mergers sheds no light on whether ERISA allows merger as a means of terminating a single-employer plan; indeed, this Court has previously declined to ascribe any significance to the placement of different ERISA provisions within the same title. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995) ("[W]e do not think that Congress intended [ERISA's provisions governing informational requirements, 29 U.S.C. §§ 1021–1031] to be supplemented by a faraway provision [29 U.S.C. § 1102(b)(3)] in another part of the statute [but in the same Title I], least of all in a way that would lead to improbable results."). If anything, the placement § 1341 and § 1412 in separate *subtitles* of Title IV implies that the two provisions do *not* overlap, and that Congress's decision *not* to place § 1412

"Special Provisions for Multiemployer Plans," contains six parts (Part 1, "Employer Withdrawals," governs employer withdrawals from ERISA plans; Part 2, "Merger or Transfer of Plan Assets or Liabilities," governs plan mergers; Part 3, "Reorganization; Minimum Contribution Requirements for Multiemployer Plans," governs reorganization of ERISA plans; Part 4, "Financial Assistance," governs the PBGC's financial assistance to insolvent plans; Part 5, "Benefits After Termination," governs benefits paid by certain terminated plans; and Part 6, "Enforcement," governs civil enforcement of ERISA); Subtitle F, "Transition Rules and Effective Dates," governs effective dates and certain matters in the Internal Revenue Code.

within Subtitle C, "Terminations," establishes that merger is not a method of plan termination.

Rather than relying solely on Congress's placement of § 1341 and § 1412 within Title IV, the Ninth Circuit should have looked to the overall structure of ERISA to resolve any perceived ambiguity in the text of 29 U.S.C. § 1341(b)(3)(A)(ii). This Court's cases instruct that:

> Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Smith v. United States, 508 U.S. 223, 233–34 (1993) (quoting *United Savings Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). This Court's holistic approach to statutory construction is all the more necessary in the ERISA context, because "ERISA is a comprehensive and reticulated statute . . . and is enormously complex and detailed." *Hughes*, 525 U.S. at 447 (citations and quotation marks omitted).

The Ninth Circuit's construction of 29 U.S.C. § 1341(b)(3)(A)(ii) as allowing for merger as a means

of termination is demonstrably not "compatible with the rest of the law," *Smith*, 508 U.S. at 234, because ERISA treats merger and termination as distinct and separate processess. Therefore, were the Ninth Circuit's reading correct, plan sponsors would be subjected to contradictory obligations and key ERISA provisions would be rendered meaningless.

First, ERISA expressly distinguishes between merger and termination by requiring, as a prerequisite to merger validity, that each plan participant be eligible to receive, in a hypothetical immediately-post-merger termination, the same benefits that the participant would have received had the original plan *terminated rather than merged*. *See* 29 U.S.C. § 1058 (barring merger "unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated)"); *see also Brillinger v. Gen. Elec. Co.*, 130 F.3d 61, 62 (2d Cir. 1997) ("Under [§ 1058], a merger may not cause reduction of the benefit below what it would be upon a hypothetical termination of the plan."). If merger is a *means* of termination, as the Ninth Circuit concluded, then § 1058 is circular at best; it makes no sense to compare the benefits guaranteed by hypothetical terminations conducted immediately *before* and *after* plan merger if merger *itself* constitutes the termination of a plan.

Second, different procedural requirements apply to termination and merger. In a termination, the

PBGC and the Internal Revenue Service approve the termination, and the plan administrator must comply with stringent notice requirements to participants *before* the distribution of plan proceeds. *See* 29 U.S.C. § 1341(a)(2). The required notice must inform participants that upon distribution the PBGC's guarantee is extinguished. 29 C.F.R. § 4041.23. By contrast, the PBGC's approval is not needed to effect a merger. Participants receive notice *after* the merger, 29 C.F.R. § 2525.104-4, and the content of the notice is different from a termination, because in a merger the PBGC's guarantee of benefit liabilities is transferred along with those liabilities to the merged plan. Were merger a valid form of termination, plan administrators would be required to comply with mutually exclusive procedural obligations.

Finally, and of particular relevance to this case, a standard termination under § 1341 *allows* for reversion to a plan sponsor of surplus plan assets attributable to the sponsor's funding. *See* 29 U.S.C. § 1344(d)(1); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988) ("Under section 1344, a plan sponsor may recapture all surplus assets after a termination of a plan if certain criteria are satisfied.").[12] Similarly, to the extent that the

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[12] In allowing a plan sponsor to recover surplus plan assets attributable to the sponsor's funding, ERISA thereby encourages employers to generously fund pension plans. *See Hawkeye Nat'l Life Ins. Co. v. Avis*, 122 F.3d 490, 502 n.7 (8th Cir. 1997) (depriving employers of residual plan assets could encourage employers to underfund plans); *Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir.

surplus assets are attributable to any plan participant contributions, upon a standard termination plan participants are entitled not only to their accrued benefits, but also to the surplus assets attributable to their own contributions. *See* 29 U.S.C. § 1344(d)(3)(A).

Merger, on the other hand, does not permit any reversion of funds to an employer, because in a merger *all* assets of the merged funds are transferred to the acquiring fund for future satisfaction of benefit liabilities, and ERISA expressly bars any plan assets from inuring to the benefit of an employer in the absence of termination or other narrowly defined circumstances. *See* 29 U.S.C. § 1103(c) (except as provided in certain circumstances, including termination, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan"). Nor does merger allow the accrued benefits of plan participants to be increased by surplus assets attributable to participant contributions. *See Brillinger*, 130 F.3d at 63 (distinguishing termination from merger with regard to the disposition of surplus plan assets);

1988) (same). By reducing or eliminating plan sponsors' entitlement to the residual assets of overfunded pension plans, the Ninth Circuit decision discourages plan sponsors from generously funding their pension plans and validates the Seventh Circuit's observation that "[i]t is possible . . . for litigation about pension plans to make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (Easterbrook, J.).

Malia, 23 F.3d at 829–30 (same). Thus, merger, which *precludes* reversion of surplus funds to the benefit of plan sponsors or plan participants, cannot be a means of termination, which *allows* reversion.

In short, termination and merger are different in kind under ERISA. The two procedures are governed by different provisions, subject to different requirements, and serve divergent purposes: termination results in the end of an ERISA-regulated plan and payment of plan assets outside of the ERISA framework, while merger results in transfer of the plan's assets and liabilities to another plan under the ERISA regime. Merger is therefore an alternative to the standard termination of a pension plan, rather than a method of implementing such a standard termination. Accordingly, upon deciding to terminate its pension plan, Crown did not have any fiduciary duty to consider PACE's merger proposal.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit and remand with instructions that judgment be entered in favor of Crown.

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APPENDIX

29 U.S.C. § 1058

§ 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act [enacted Sept. 2, 1974], unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of this Act applies.

29 U.S.C. § 1341

§ 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations.

(1) Exclusive means of plan termination. Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 4042 [29 U.S.C. § 1342], a single-employer plan may be terminated only in a standard termination under subsection (b) or a distress termination under subsection (c).

(2) 60-Day notice of intent to terminate. Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements. The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute

proceedings to involuntarily terminate a plan under section 4042 [29 U.S.C. § 1342].

(b) Standard termination of single-employer plans.

(1) General requirements. A single-employer plan may terminate under a standard termination only if--

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2),

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure.

(A) Notice to the corporation. As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2), the plan administrator shall send a notice to the corporation setting forth--

(i) certification by an enrolled actuary--

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that--

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of the Internal Revenue Code of 1986 [26 U.S.C. § 412(i)].

(B) Notice to participants and beneficiaries of

benefit commitments [liabilities]. No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan--

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from the corporation of noncompliance.

(i) In general. Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if--

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b), that there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities; or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension. The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may

be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance. The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if--

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets.

(A) In general. In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 4044 [29 U.S.C. § 1344].

In distributing such assets, the plan administrator shall--

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 4050 [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets. Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan[.]

(4) Continuing authority. Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 4003 [29 U.S.C. § 1303] with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corpora-

tion's obligations under section 4022 [29 U.S.C. § 1322].

(5) Special rule for certain plans where cessation or change in membership of a controlled group.

(A) In general. Except as provided in subparagraph (B), if--

(i) there is transaction or series of transactions which result in a person ceasing to be a member of a controlled group, and

(ii) such person immediately before the transaction or series of transactions maintained a single-employer plan which is a defined benefit plan which is fully funded,

then the interest rate used in determining whether the plan is sufficient for benefit liabilities or to otherwise assess plan liabilities for purposes of this subsection or section 4042(a)(4) [29 U.S.C. § 1342(a)(4)] shall be not less than the interest rate used in determining whether the plan is fully funded.

(B) Limitations. Subparagraph (A) shall not apply to any transaction or series of transactions unless--

(i) any employer maintaining the plan immediately before or after such transaction or series of transactions--

(I) has an outstanding senior unsecured debt instrument which is rated investment grade by each of the nationally recognized statistical rating organizations for corporate bonds that has issued a credit rating for such instrument, or

(II) if no such debt instrument of such employer has been rated by such an organization but 1 or more of such organizations has made an issuer credit rating for such employer, all such organizations which have so rated the employer have rated such employer investment grade, and

(ii) the employer maintaining the plan after the transaction or series of transactions employs at least 20 percent of the employees located in the United States who were employed by such employer immediately before the transaction or series of transactions.

(C) Fully funded. For purposes of subparagraph (A), a plan shall be treated as fully funded with respect to any transaction or series of transactions if--

(i) in the case of a transaction or series of transactions which occur in a plan year beginning before January 1, 2008, the funded current liability percentage determined under section 302(d) [29 U.S.C. § 1082(d)] for the plan year is at least 100 percent, and

(ii) in the case of a transaction or series of transactions which occur in a plan year beginning on or after such date, the funding target attainment percentage determined under section 303 [29 U.S.C. § 1083] is, as of the valuation date for such plan year, at least 100 percent.

(D) 2 year limitation. Subparagraph (A) shall not apply to any transaction or series of transactions if the plan referred to in subparagraph (A)(ii) is terminated under section 4041(c) or 4042 [29 U.S.C. § 1341(c) or 1342] after the close of the 2-year period beginning on the date on which the first such transaction occurs.

(c) Distress termination of single-employer plans.

(1) In general. A single-employer plan may terminate under a distress termination only if--

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2),

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraphs (B) and (D) of paragraph (2) are met.

(2) Termination requirements.

(A) Information submitted to the corporation. As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2), the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 4062 [29 U.S.C. § 1362], certification by an enrolled actuary of--

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 4022 [29 U.S.C. § 1322], and

(V) whether the plan is sufficient for guaranteed benefits as of such dates:

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date--

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 4022(c) [29 U.S.C. § 1322(c)]; and

(iv) certification by the plan administrator that--

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of the Internal Revenue Code of 1986 [26 U.S.C. § 412(i)].

(B) Determination by the corporation of

necessary distress criteria. Upon receipt of the notice of intent to terminate required under subsection (a)(2) and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings. The requirements of this clause are met by a person if--

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under title 11, United States Code [11 U.S.C. §§ 101 et seq.], or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings. The requirements of this clause are met by a person if--

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under title 11, United States Code [11 U.S.C. §§ 101 et seq.], or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed, and

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce. The requirements of

this clause are met by a person if such person demonstrates to the satisfaction of the corporation that--

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation. The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(D) Disclosure of termination information.

(i) In general. A plan administrator that has filed a notice of intent to terminate under subsection (a)(2) shall provide to an affected party any information provided to the corporation under subsection (a)(2) not later than 15 days after--

(I) receipt of a request from the affected party for the information; or

(II) the provision of new information to the corporation relating to a previous request.

(ii) Confidentiality.

(I) In general. The plan administrator shall not provide information under clause (i) in a form that includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(II) Limitation. A court may limit disclosure under this subparagraph of confidential information described in section 552(b) of title 5, United States Code [5 U.S.C. § 552(b)], to any authorized representative of the participants or beneficiaries that agrees to ensure the confidentiality of such information.

(iii) Form and manner of information; charges.

(I) Form and manner. The corporation may prescribe the form and manner of the provision of information under this subparagraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(II) Reasonable charges. A plan administra-

tor may charge a reasonable fee for any information provided under this subparagraph in other than electronic form.

(iv) Authorized representative. For purposes of this subparagraph, the term "authorized representative" means any employee organization representing participants in the pension plan.

(3) Termination procedure.

(A) Determinations by the corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities. If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall--

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination. After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities. In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3), and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities. In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3), make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency. In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 4042 [29 U.S.C. § 1342].

(C) Finding after authorized commencement of termination that plan is unable to pay benefits.

(i) Finding with respect to benefit liabilities which are not guaranteed benefits. If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 4022 [29 U.S.C. § 1322], the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits. If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 4022 [29 U.S.C. § 1322], the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation

concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 4042 [29 U.S.C. § 1342].

(D) Administration of the plan during interim period.

(i) In general. The plan administrator shall--

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements. The requirements of this clause are met by the plan administrator if the plan administrator--

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer

contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer,-and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 4022 [29 U.S.C. § 1322] or to which assets are required to be allocated under section 4044 [29 U.S.C. § 1344].

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency. For purposes of this section--

(1) Sufficiency for benefit liabilities. A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits. A single-employer plan is sufficient for guaranteed benefits

if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on the conversion of a defined benefit plan to a defined contribution plan. The adoption of an amendment to a plan which causes the plan to become a plan described in section 4021(b)(1) [29 U.S.C. § 1321(b)(1)] constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) or distress termination under subsection (c).

29 U.S.C. § 1344

§ 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries. In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity--

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay

status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth--

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a) [29 U.S.C. § 1322b(a)]), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5)(B) [29 U.S.C. § 1322(b)(5)(B)] did not apply.

For purposes of this paragraph, section 4021 [29 U.S.C. § 1321] shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories. For purposes of subsection (a)--

(1) The amount allocated under any paragraph of subsection (a) with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a).

(2) If the assets available for allocation under any paragraph of subsection (a) (other than paragraphs (4), (5), and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(3) If assets available for allocation under paragraph (4) of subsection (a) are insufficient to satisfy in full the benefits of all individuals who are described in that paragraph, the assets shall be allocated first to benefits described in subparagraph (A) of that paragraph. Any remaining assets shall then be allocated to benefits described in subparagraph (B) of that paragraph. If assets allocated to such subparagraph (B) are insufficient to satisfy in full the benefits described in that subparagraph, the assets shall be allocated pro rata among individuals on the basis of the present value

(as of the termination date) of their respective benefits described in that subparagraph.

(4) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(5) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 401(a)(4)] then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of such Code [26 U.S.C. § 401(a) or 403(a)], the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) shall be reallocated to the extent necessary to avoid such discrimination.

(6) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(7) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) in accordance with regulations prescribed by the corporation.

(c) Increase or decrease in value of assets. Any increase or decrease in the value of the assets of a single-employer plan occurring during the period

beginning on the later of (1) the date a trustee is appointed under section 4042(b) [29 U.S.C. § 1342(b)] or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets.

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)

(A) In determining the extent to which a plan provides for the distribution of plan assets to the

employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 208 [29 U.S.C. § 1058] occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of the Internal Revenue Code of 1986 [26 U.S.C. § 414(b), (c), (m) or (o)].

(3) (A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain af-

ter satisfaction of all liabilities described in subsection (a), such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 206(d)(3)(K) [29 U.S.C. § 1056(d)(3)(K)]).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying--

(i) the market value of the total remaining assets, by

(ii) a fraction--

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2)), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a).

(C) For purposes of this paragraph, each person who is, as of the termination date--

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 203(e) [29 U.S.C. § 1053(e)] or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2)).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of the Internal Revenue Code of 1986 [26 U.S.C. § 4980(d)] (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990 [enacted Nov. 5, 1990]) or section 404(d) of this Act [29 U.S.C. 1104(d)] with respect to any distribution of residual assets of a single-employer plan to the employer.

(e) Bankruptcy filing substituted for termination date. If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination

date of the plan, then subsection (a)(3) shall be applied by treating the date such petition was filed as the termination date of the plan.

[(f)](e) Valuation of section 4062(c) liability for determining amounts payable by corporation to participants and beneficiaries.

(1) In general. In the case of a terminated plan, the value of the recovery of liability under section 4062(c) [29 U.S.C. § 1362(c)] allocable as a plan asset under this section for purposes of determining the amount of benefits payable by the corporation shall be determined by multiplying--

(A) the amount of liability under section 4062(c) [29 U.S.C. § 1362(c)] as of the termination date of the plan, by

(B) the applicable section 4062(c) [29 U.S.C. § 1362(c)] recovery ratio.

(2) Section 4062(c) recovery ratio. For purposes of this subsection--

(A) In general. Except as provided in subparagraph (C), the term "section 4062(c) [29 U.S.C. § 1362(c)] recovery ratio" means the ratio which--

(i) the sum of the values of all recoveries under section 4062(c) [29 U.S.C. § 1362(c)] determined by the corporation in connection with plan terminations described under subparagraph (B), bears to

(ii) the sum of all the amounts of liability under section 4062(c) [29 U.S.C. § 1362(c)] with respect to such plans as of the termination date in connection with any such prior termination.

(B) Prior terminations. A plan termination described in this subparagraph is a termination with respect to which--

(i) the value of recoveries under section 4062(c) [29 U.S.C. § 1362(c)] have been determined by the corporation, and

(ii) notices of intent to terminate were provided (or in the case of a termination by the corporation, a notice of determination under section 4042 [29 U.S.C. § 1342] was issued) during the 5-Federal fiscal year period ending with the third fiscal year preceding the fiscal year in which occurs the date of the notice of intent to terminate (or the notice of determination under section 4042 [29 U.S.C. § 1342]) with respect to the plan termination for which the recovery ratio is being determined.

(C) Exception. In the case of a terminated plan with respect to which the outstanding amount of benefit liabilities exceeds $ 20,000,000, the term "section 4062(c) recovery ratio" means, with respect to the termination of such plan, the ratio of--

(i) the value of the recoveries on behalf of the

plan under section 4062(c) [29 U.S.C. § 1362(c)], to

(ii) the amount of the liability owed under section 4062(c) [29 U.S.C. § 1362(c)] as of the date of plan termination to the trustee appointed under section 4042 (b) or (c) [29 U.S.C. § 1342(b) or (c)].

(3) Subsection not to apply. This subsection shall not apply with respect to the determination of--

(A) whether the amount of outstanding benefit liabilities exceeds $ 20,000,000, or

(B) the amount of any liability under section 4062 [29 U.S.C. § 1362(c)] to the corporation or the trustee appointed under section 4042 (b) or (c) [29 U.S.C. § 1342(c)].

(4) Determinations. Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

29 U.S.C. § 1412

§ 1412. Transfers between a multiemployer plan and a single-employer plan

(a) General authority. A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger. No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

(c) Liability of multiemployer plan to corporation where single-employer plan terminates within 60 months after effective date of transfer; amount of liability, exemption, etc.

(1) Except as provided in paragraphs (2) and (3), a multiemployer plan which transfers liabilities to a single-employer plan shall be liable to the corporation if the single-employer plan terminates within 60 months after the effective date of the transfer. The amount of liability shall be the lesser of--

(A) the amount of the plan asset insufficiency of the terminated single-employer plan, less 30 percent of the net worth of the employer who maintained the single-employer plan, determined

in accordance with section 4062 or 4064 [29 U.S.C. § 1362 or 1364], or

(B) the value, on the effective date of the transfer, of the unfunded benefits transferred to the single-employer plan which are guaranteed under section 4022 [29 U.S.C. § 1322].

(2) A multiemployer plan shall be liable to the corporation as provided in paragraph (1) unless, within 180 days after the corporation receives an application (together with such information as the corporation may reasonably require for purposes of such application) from the multiemployer plan sponsor for a determination under this paragraph--

(A) the corporation determines that the interests of the plan participants and beneficiaries and of the corporation are adequately protected, or

(B) fails to make any determination regarding the adequacy with which such interests are protected with respect to such transfer of liabilities.

If, after the receipt of such application, the corporation requests from the plan sponsor additional information necessary for the determination, the running of the 180-day period shall be suspended from the date of such request until the receipt by the corporation of the additional information requested. The corporation may by regulation prescribe procedures and standards for the issuance of determinations under this paragraph. This para-

graph shall not apply to any application submitted less than 180 days after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980].

(3) A multiemployer plan shall not be liable to the corporation as provided in paragraph (1) in the case of a transfer from the multiemployer plan to a single-employer plan of liabilities which accrued under a single-employer plan which merged with the multiemployer plan, if, the value of liabilities transferred to the single-employer plan does not exceed the value of the liabilities for benefits which accrued before the merger, and the value of the assets transferred to the single-employer plan is substantially equal to the value of the assets which would have been in the single-employer plan if the employer had maintained and funded it as a separate plan under which no benefits accrued after the date of the merger.

(4) The corporation may make equitable arrangements with multiemployer plans which are liable under this subsection for satisfaction of their liability.

(d) Guarantee of benefits under single-employer plan. Benefits under a single-employer plan to which liabilities are transferred in accordance with this section are guaranteed under section 4022 [29 U.S.C. § 1322] to the extent provided in that section as of the effective date of the transfer and the plan is a successor plan.

(e) Transfer of liabilities by multiemployer plan to single-employer plan.

(1) Except as provided in paragraph (2), a multiemployer plan may not transfer liabilities to a single-employer plan unless the plan sponsor of the plan to which the liabilities would be transferred agrees to the transfer.

(2) In the case of a transfer described in subsection (c)(3), paragraph (1) of this subsection is satisfied by the advance agreement to the transfer by the employer who will be obligated to contribute to the single-employer plan.

(f) Additional requirements by corporation for protection of interest of plan participants, beneficiaries and corporation; approval by corporation of transfer of assets or liabilities to single-employer plan from plan in reorganization; covered transfers in connection with termination.

(1) The corporation may prescribe by regulation such additional requirements with respect to the transfer of assets or liabilities as may be necessary to protect the interests of plan participants and beneficiaries and the corporation.

(2) Except as otherwise determined by the corporation, a transfer of assets or liabilities to a single-employer plan from a plan in reorganization under section 4241 [29 U.S.C. § 1421] is not effective unless the corporation approves such transfer.

(3) No transfer to which this section applies, in connection with a termination described in section 4041A(a)(2) [29 U.S.C. § 1341a(a)(2)] shall be effective unless the transfer meets such requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

29 CFR § 4041.28

§ 4041.28. Closeout of plan.

(a) Distribution deadline.

(1) In general. Unless a notice of noncompliance is issued under § 4041.31(a), the plan administrator must complete the distribution of plan assets in satisfaction of plan benefits (through priority category 6 under section 4044 of ERISA and part 4044 of this chapter) by the later of –

(i) 180 days after the expiration of the PBGC's 60-day (or extended) review period under § 4041.26(a); or

(ii) If the plan administrator meets the requirements of § 4041.25(c), 120 days after receipt of a favorable determination from the IRS.

(2) Revocation of notice of noncompliance. If the PBGC revokes a notice of noncompliance issued under § 4041.31(a), the distribution deadline is extended until the 180th day after the date of the revocation.

(b) Assets insufficient to satisfy plan benefits. If, at the time of any distribution, the plan administrator determines that plan assets are not sufficient to satisfy all plan benefits (with assets determined net of other liabilities, including PBGC premiums), the plan administrator may not make any further distribution of assets to effect the plan's termination and must promptly notify the PBGC.

(c) Method of distribution.

(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

(2) Lump sum calculations. In the absence of evidence establishing that another date is the "annuity starting date" under the Code, the distribution date is the "annuity starting date" for purposes of –

(i) Calculating the present value of plan benefits that may be provided in a form other than by purchase of an irrevocable commitment from an insurer (e.g., in selecting the interest rate(s) to be used to value a lump sum distribution); and

(ii) Determining whether plan benefits will be paid in such other form.

(3) Selection of insurer. In the case of plan benefits that will be provided by purchase of an irrevocable commitment from an insurer, the plan administrator must select the insurer in accordance with the fiduciary standards of Title I of ERISA.

(4) Participating annuity contracts. In the case of a plan in which any residual assets will be distributed to participants, a participating annuity contract may be purchased to satisfy the requirement

that annuities be provided by the purchase of irevocable commitments only if the portion of the price of the contract that is attributable to the participation feature –

(i) Is not taken into account in determining the amount of residual assets; and

(ii) Is not paid from residual assets allocable to participants.

(5) Missing participants. The plan administrator must distribute plan benefits to missing participants in accordance with part 4050.

(d) Provision of annuity contract. If plan benefits are provided through the purchase of irrevocable commitments –

(1) Either the plan administrator or the insurer must, within 30 days after it is available, provide each participant and beneficiary with a copy of the annuity contract or certificate showing the insurer's name and address and clearly reflecting the insurer's obligation to provide the participant's or beneficiary's plan benefits; and

(2) If such a contract or certificate is not provided to the participant or beneficiary by the date on which the post-distribution certification is required to be filed in order to avoid the assessment of penalties under § 4041.29(b), the plan administrator must, no later than that date, provide the participant and beneficiary with a notice that includes –

(i) A statement that the obligation for providing the participant's or beneficiary's plan benefits has transferred to the insurer;

(ii) The name and address of the insurer;

(iii) The name, address, and telephone number of the person designated by the insurer to answer questions concerning the annuity; and

(iv) A statement that the participant or beneficiary will receive from the plan administrator or insurer a copy of the annuity contract or a certificate showing the insurer's name and address and clearly reflecting the insurer's obligation to provide the participant's or beneficiary's plan benefits.